

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP900

Cir. Ct. No. 2014FA715

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

JANE MARIE BODART F/K/A JANE MARIE BALTHAZOR,

PETITIONER-RESPONDENT,

v.

LESLIE JAMES BALTHAZOR,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
JOHN ZAKOWSKI, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Leslie Balthazor appeals a judgment of divorce, in which the circuit court made factual determinations regarding the value of Leslie’s individual retirement account (IRA) and how much of the funds withdrawn from that account had been spent on marital obligations. We conclude the circuit court’s factual determinations in these regards were not clearly erroneous, and we affirm them.

¶2 However, we reverse the judgment insofar as it includes a mathematical error, and the circuit court failed to properly exercise its discretion on the record regarding its decision not to include a business debt of Leslie’s on the marital balance sheet. We also conclude the circuit court failed to adequately explain its decision to award Jane Bodart attorney fees for certain of Leslie’s discovery violations, and how it determined the amount of those fees. We therefore remand to the circuit court to address these matters and to modify the property division and make other orders as it deems necessary.

BACKGROUND

¶3 After being married for over thirty years, Jane petitioned for divorce from Leslie in July 2014.¹ The central dispute concerned property division, including an IRA in Leslie’s name that he had closed in May 2014 after withdrawing all of its funds. Jane retained counsel and filed a motion for a

¹ Matters relating to the custody and support of the parties’ minor children were settled at the pretrial hearing and are not at issue in this appeal.

hearing and temporary order concerning, among other things, the parties' financial affairs.² The temporary order required Leslie to provide Jane's attorney with an accounting of the funds withdrawn from his IRA. The circuit court then entered a scheduling order setting the final divorce hearing for May 4, 2015.

¶4 The final hearing occurred over two dates, May 4 and 22, 2015. Both Jane and Leslie testified and had opportunities to enter evidence into the record. The two principal issues at the final hearing were the amount Leslie had withdrawn from the IRA, and whether that money had been spent for marital purposes. In December 2015, the circuit court entered its decision and order on the IRA issues, finding that Leslie had withdrawn a total of \$74,692.07 from his IRA. The court noted that at the final hearing, Leslie testified he had spent virtually all the withdrawn funds on marital expenses, whereas Jane (after reviewing bank account statements Leslie had provided) asserted that only \$25,000 had been spent for marital purposes, while the rest of the IRA money had been withdrawn from the parties' bank account but was unaccounted for.

¶5 The circuit court concluded there was no way to determine the exact amount Leslie had spent on marital expenses from the withdrawn funds. The court stated in such situations it "often splits the difference," which would result in a finding that "50% of the nearly \$50,000 [in unaccounted-for funds] went to pay marital expenses." However, the court found that Leslie's "more timely compliance with discovery orders would have saved some [of Jane's] attorney fees." In lieu of awarding Jane attorney's fees, the court elected to factor Leslie's

² Leslie proceeded pro se throughout the circuit court proceedings. On appeal, Jane appears pro se, while Leslie is now represented by counsel.

discovery violations into its treatment of the unaccounted-for funds. It therefore concluded 55% of the unaccounted-for funds would be treated as Leslie's assets on the marital balance sheet. The remaining 45% would be treated as having been spent on marital obligations.

¶6 The divorce judgment incorporated the findings and property division contained in the circuit court's December 2015 order. Leslie now appeals, challenging the circuit court's findings related to the value of his IRA, the amount of the IRA withdrawals that were spent on marital obligations, the contribution toward Jane's attorney's fees, and other matters.

DISCUSSION

¶7 The issues in this case principally concern property division. A circuit court's property division determinations in a divorce proceeding will be upheld unless the circuit court erroneously exercised its discretion. *Steinmann v. Steinmann*, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145. A circuit court erroneously exercises its discretion if it makes an error of law or fails to base its decision on the facts of record. *Id.* A circuit court's factual finding will not be disturbed unless it is clearly erroneous. *Doerr v. Doerr*, 189 Wis. 2d 112, 121, 525 N.W.2d 745 (Ct. App. 1994). When reviewing a finding of fact, we search the record for evidence to support findings the circuit court reached, not for evidence to support findings the circuit court could have made, but did not. *Covelli v. Covelli*, 2006 WI App 121, ¶14, 293 Wis. 2d 707, 718 N.W.2d 260.

¶8 Leslie first challenges the circuit court's factual finding that his IRA had a total after-tax value of \$74,692.07. Leslie asserts that certain documents (including IRA statements, bank statements, and copies of cancelled checks) were submitted to the circuit court and specifically referenced at the final hearing, but

they are missing from the record on appeal. He argues these documents showed that the circuit court's IRA valuation was incorrect and that his IRA had a pretax value of approximately \$58,740.³ He asks this court to "question why these documents are not within the circuit court's file, having been submitted by a party as evidence in a contested divorce and acknowledged by the court on the record."

¶9 This court has thoroughly reviewed the record, and the answer to Leslie's question appears to be that the documents that may have proved his valuation were never actually introduced into evidence or submitted to the circuit court. Although Leslie includes certain documents in his appendix, this is improper. These documents (which appear to consist of IRA statements) are not part of the record on appeal, to which our review is confined. *See Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256. In fact, these documents appear to have been sent only to Jane's attorney after the close of evidence in this case, who promptly objected to their consideration. In the following paragraphs, we chronicle the manner in which this litigation progressed to illustrate that the circuit court did not erroneously exercise its discretion here, nor did it render a clearly erroneous factual finding.

¶10 There was disputed testimony at the final hearing regarding when Jane learned that Leslie had withdrawn money from his IRA; Jane testified she learned of the withdrawals for the first time at the temporary hearing, which was

³ The 2014 1099-R form indicated the account had an approximate value of \$47,000 after accounting for tax withholdings. *See infra* ¶14. Based on a deposit to the parties' joint bank account in May 2013, Jane asserted Leslie had received an additional after-tax distribution of \$27,700, which would have generated an additional 1099-R form for 2013 that Leslie allegedly failed to disclose. *See infra* ¶¶11, 14.

held shortly after Jane petitioned for divorce.⁴ Jane's pretrial brief represented that, despite the temporary order and a subpoena, Leslie had not provided any information regarding the account. At the pretrial hearing in April 2015, Leslie provided a 2014 1099-R tax form indicating that Leslie received a pretax distribution of \$58,740.08 from his IRA. Jane's pretrial marital balance sheet reflected this amount in Leslie's column.

¶11 The 2014 1099-R was received into evidence at the final hearing on Monday, May 4, 2015. Jane testified that in addition to the \$58,740 distribution in 2014, she believed Leslie received an additional distribution from his IRA in 2013. Jane believed a withdrawal in 2013 would have resulted in a 1099-R for that year, which document Jane believed Leslie had failed to disclose.⁵ Jane testified she had not received from Leslie an accounting of where any of the money withdrawn from his IRA had been spent.

¶12 Leslie (who was, again, pro se) then attempted to cross-examine Jane, claiming he had provided "proof of where the money went from ... my retirement." Leslie claimed to have provided Jane with "every statement for all 2013, all of 2014, plus the cancelled checks" to show how the IRA money was spent. Jane's attorney interjected, stating that Leslie, on the Friday prior to the Monday hearing date, had provided him with some bank statements for the parties' joint bank account. Jane's attorney disputed that Leslie had provided any statements from 2013, and Leslie ultimately admitted he had provided bank

⁴ Jane testified she did not know how much money had been in Leslie's IRA prior to his withdrawals.

⁵ Jane had experience as a tax advisor.

statements dating only from May 2014, because that was when Leslie claimed he withdrew all of the IRA funds.

¶13 Leslie began his testimony on May 4 but was unable to finish. The matter was continued until May 22, 2015. At the inception of the May 22 hearing, the court invited Leslie to introduce any exhibits he wished to have considered and address the court on any issues that had been previously discussed. Leslie responded by requesting the court's position on the evidence he had previously submitted, which he claimed showed where the retirement funds went. The court stated it would review all the evidence and issue a decision, and "[t]he important thing is [that] you just present whatever information that you do have regarding that issue." At several points, the court stressed that Leslie should introduce whatever exhibits he had so they could be made part of the file and the court could consider them. Leslie presented numerous exhibits, none of which pertained to his IRA.

¶14 The total value of Leslie's IRA prior to his withdrawals was a key issue during the final hearing. Leslie claimed the total account value was the amount reflected on the 2014 1099-R, approximately \$58,740. Meanwhile, Jane presented additional evidence regarding the IRA withdrawal she believed occurred in 2013. Jane noted that the parties' joint bank account showed a \$27,700 deposit from the IRA in May 2013. Adding this amount to the after-tax distribution of approximately \$47,000 (as reflected on the 2014 1099-R form), Jane asserted Leslie had received approximately \$75,000 from his IRA.

¶15 Leslie acknowledged receiving \$27,700 from his IRA in May 2013, but he claimed he received that distribution as a loan and paid back \$500 per month until he converted the loan to a withdrawal, took out the remaining funds,

and closed the account in May 2014. Leslie asserted there was no tax consequence (and, hence, no 2013 1099-R) because the amount withdrawn in that year was a loan. However, Leslie submitted no documentary evidence of the fact that a loan had been made; the only evidence of this was his own testimony.

¶16 As Leslie finished his direct examination testimony, the circuit court asked him to summarize how he spent the funds from his IRA. Leslie testified “the majority went to, just about 95 percent or 98 percent went to bills.” The court asked Leslie if he had an exhibit showing where the funds went, at which time Jane’s attorney interjected and stated he had organized Leslie’s earlier submissions regarding the joint bank account into an exhibit that would be introduced during Jane’s rebuttal testimony. That exhibit, number 29, consisted of a spreadsheet documenting Jane’s accounting of Leslie’s withdrawals and expenditures, the 2014 1099-R, and bank account statements dated between May 2013 and July 2014. Jane’s accounting showed approximately \$50,800 in unexplained withdrawals, such as checks with no description or ATM withdrawals. She agreed the remainder of the IRA money—about \$25,000—had gone toward marital expenses.

¶17 The circuit court gave the parties the opportunity to add any additional information at the end of the hearing. Leslie asserted there “was never \$75,000 in the account” and asked the court, “[W]ho do I have to bring in here?” After the court questioned Jane’s attorney about Jane’s pretrial property division worksheet and the bank statements Leslie had submitted just prior to the first hearing date, Leslie offered to “go to the bank and I can have them run off copies of every check. ... [I]f I have to go and take another five months for this to get over, I don’t care.” The court responded that the matter would be concluded at the

end of the hearing, after which it would review the exhibits before it and issue a written decision.

¶18 In a letter to the circuit court dated May 26, 2015, Jane's attorney represented that, on that date, he received thirteen pages of documents from Leslie regarding the IRA.⁶ The letter references Leslie's submission as including IRA statements from December 31, 2013, June 30, 2014, and December 31, 2014, but these documents themselves do not appear to have ever been made part of the record and, in any event, were submitted to Jane's attorney after the close of evidence.⁷ Jane's attorney objected to the circuit court's consideration of these documents based on their untimely filing and Leslie's repeated discovery violations. Jane's attorney requested actual attorney's fees if the court elected to consider Leslie's tardily submitted documents. However, Jane's attorney urged the court to accept Jane's position and find that Leslie had received approximately \$50,800 in unaccounted-for funds, based on a total after-tax IRA valuation of approximately \$75,000 and given Jane's concession that \$25,000 of the IRA money had gone toward marital expenses. The circuit court's December 2015 decision and order followed.

⁶ Leslie is incorrect that this letter is not in the record. However, it is inexplicably placed among the exhibits from the May 22, 2015 hearing.

⁷ Online CCAP records (as well as the record index transmitted from the circuit court) show that Leslie did not make any submissions to the circuit court between the final hearing date on May 22, 2015, and the date of the circuit court's decision and order regarding the IRA issues. The record also indicates no motion was filed to supplement the record, even though the record reflects that Leslie became represented by counsel on May 16, 2016, and the circuit court's notice of compilation of the record and transmission of the record to the court of appeals did not occur until June 2 and June 9, 2016, respectively.

¶19 Based on the foregoing, we reject Leslie’s challenge to the circuit court’s finding of fact regarding the valuation of his IRA. The time to present evidentiary materials on the issue of whether the May 2013 IRA disbursement was a loan or a withdrawal was, at the latest, the evidentiary hearing. Based on the pretrial hearings and the parties’ pretrial filings, Leslie had ample notice that the IRA’s value would be a significant issue at the final hearing. Yet he presented no exhibits—either at the May 4 hearing or, more significantly, at the May 22 hearing—regarding that issue. The record does not corroborate his assertion that the IRA documents in question went “missing.” Rather, it appears he never submitted these documents to the circuit court at all—only to Jane’s attorney, and then belatedly.

¶20 Leslie claims the circuit court must have had the IRA documents before it, because it acknowledged receiving those documents during the final hearing. Our review of the final hearing transcripts shows no such acknowledgment by the court. The court stated it had copies of some documentation Leslie provided, but those documents seem to have been copies of the joint bank statements Leslie provided on the Friday prior to the May 4 hearing date.⁸ Nowhere did the court specifically reference having received any of the

⁸ For example, as Leslie was claiming he had “proved where the money went” while questioning Jane at the first hearing date, the circuit court interrupted and stated it “[thought it] got the same information,” an apparent reference to the joint bank account statements. Indeed, shortly thereafter the court remarked that Leslie “provided statements from beyond 2014. My first one here starts in May of 2014 from Chase.”

(continued)

IRA documentation Leslie provides in his appendix in this appeal. The record simply does not bear out Leslie's accusation that the court "failed to retain the documents within the court's file."

¶21 Leslie raises several other issues. He claims the circuit court erroneously exercised its discretion when it determined the amount of the IRA funds that had been spent on marital expenses.⁹ Having concluded that Leslie had received approximately \$75,000 from his IRA (a finding that we affirm, as set forth above), the court proceeded to find that approximately \$52,330 of that amount had been put toward marital expenses.

¶22 The circuit court recognized that there was a factual dispute regarding how much of the IRA money had been spent in furtherance of the marriage. Leslie testified that "99 percent of it went or 98 percent of it went to paying business and personal bills. The rest went to gas money, extracurricular money for the kids, food" Jane, however, conceded only that roughly \$25,000 was spent on legitimate marital expenses, with the remainder of the IRA funds being unaccounted for. In resolving this dispute, the court again noted Leslie's failure to respond to discovery requests pertaining to his finances, including the IRA. The court ultimately determined it was reasonable to conclude that some

At the second hearing date, Leslie was engaged in a dialogue with Jane's attorney when Leslie complained that although Jane's attorney had given him a copy of Exhibit 29, Leslie had not received "my, copy, my copy that I gave to you of all of the statements and things I have given you." The court responded that it had a copy, after which Leslie claimed the documents in the court's possession confirmed his position: "And I took 27,000 out the first time. The deposit shows, because I put it right in the account. The deposit shows what I took out." Again, when considered in context, the circuit court appears to be acknowledging that it received Leslie's submission of joint bank account statements, nothing more.

⁹ Contrary to Leslie's argument, we review a circuit court's finding of fact using the "clearly erroneous" standard. *See supra* ¶7.

additional funds over \$25,000 had been used on marital expenses, but it stated there was “no way to determine the exact amount.” Accordingly, the court decided to “split the difference,” allocating 45% of the approximately \$50,000 in missing money to marital expenses and assigning to Leslie the remaining 55%.

¶23 Leslie asserts the circuit court’s determinations were based on an erroneous accounting by Jane and her attorney. Jane’s Exhibit 29, presented at the final hearing, included a spreadsheet in which she opined that there was nearly \$51,000 in unaccounted-for IRA funds, including about \$32,000 in unexplained expenditures on the bank account statements contained in that exhibit. Leslie complains Jane provided no basis for those two numbers on her spreadsheet.

¶24 To the contrary, the numbers provided on Jane’s spreadsheet reflect both a logical and evidentiary basis for her conclusions. The spreadsheet simply tabulated the IRA withdrawals, some of which were deposited into the parties’ joint bank account. Jane then subtracted the amounts reflected as withdrawals on the bank statements Leslie had provided, nearly all of which Leslie testified were for marital expenses. However, these withdrawals did not account for all of the IRA funds. According to the spreadsheet, the bank statements showed that just over \$56,000 had been spent, whereas Jane believed Leslie’s IRA contained nearly \$75,000. This left about \$19,000 in unaccounted-for IRA funds (i.e., funds that had been disbursed but not deposited into the parties’ joint bank account).

¶25 Jane also identified approximately \$32,000 in unexplained withdrawals from their bank account. These withdrawals were identified on the bank statements as either cash withdrawals or checks with no descriptions. Jane testified that all her tabulations had been derived from the bank statements Leslie provided, giving him ample notice of the source of, and opportunity to challenge,

Jane's math. The circuit court did not clearly err when it made factual findings consistent with Jane's testimony and her calculations, all of which were apparently based on Leslie's own submissions.

¶26 Leslie also asserts Jane's testimony was unreliable. First, he challenges Jane's concession that approximately \$25,000 of the money Leslie received from his IRA was spent on marital debts. However, this concession inured to Leslie's benefit, as Jane was agreeing with his position as to that portion of the funds in question. The circuit court ultimately agreed with Leslie that more than the \$25,000 to which Jane conceded had been expended on marital debts.

¶27 Leslie also contends Jane could not credibly testify that only \$25,000 had been spent toward marital expenses, given that, by her own admission, she had not been involved in handling the couple's finances for four to five years. However, Jane's testimony was based on the bank account statements Leslie had provided, not her own personal experience paying bills. The relative weight to give her testimony versus Leslie's testimony was a matter to be determined by the fact finder. *See Covelli*, 293 Wis. 2d 707, ¶14.

¶28 Leslie claims the circuit court compounded its alleged errors by disregarding the evidence he presented at the final hearing. To the contrary, the record shows Leslie was dilatory in filing his financial information, and he presented scant information at the hearing regarding how his IRA funds had been spent. Contrary to his argument, his testimony and evidence did not conclusively establish "how all of the roughly \$47,000 withdrawal was spent." It is evident the circuit court found Leslie incredible regarding his claim that he spent nearly all of the money received from his IRA on marital obligations, and Leslie failed to

present any record evidence to demonstrate that this credibility finding was clear error.

¶29 Leslie next argues the circuit court made a mathematical error in calculating the amount of total assets awarded to Leslie. Leslie claims the court erroneously added the assets in his column of the marital balance sheet, reaching a sum of \$168,820.46 when in fact the sum was \$166,209.46, a difference of \$2611. Jane concedes this error. Accordingly, we reverse the judgment and remand with directions that the circuit court correct the mathematical error and modify the judgment accordingly.

¶30 On remand, we also direct the circuit court to address its failure to include in the marital estate a debt on which Leslie testified and presented evidence at the final hearing. Leslie presented correspondence from a collection agency regarding a bill in excess of \$4000 for Yellow Pages advertising. Leslie offered extensive testimony explaining this bill at the hearing, including that the advertising was used for referrals for his home improvement business. Although Jane's attorney interposed a hearsay objection, the court overruled it and stated it would consider the documents. Yet, the circuit court offered no reason for refusing to record the Yellow Pages debt on the parties' marital balance sheet, even as it accepted other debts about which Leslie had testified. On remand, the court shall either include the debt in the property division or exercise its discretion on the record, explaining why that debt should be Leslie's alone.

¶31 Finally, Leslie challenges the circuit court's decision to require Leslie to contribute approximately \$2500 to Jane's attorney's fees. Rather than award the attorney's fees outright, the circuit court factored the fees into its percentage calculation on the IRA bank withdrawals as follows:

The court does find that a more timely compliance with discovery orders would have saved some attorney fees. The court will not order specific attorney's fees, but will factor that into the treatment of the unaccounted for expenditures. The court will therefore assign that 45% of the retirement funds were used for marital expenses. This means Leslie is to bear a larger percentage (55%) of the bills paid from this asset, and this will be reflected in the equalization payment. (This is the equivalent of a contribution of \$2,484.61 in attorney's fees.) If the court takes \$74,692.07 in retirement funds and subtracts the \$25,000 accounted-for-expenditures, \$49,692.07 in unexplained expenditures remains. 45% of that amount is \$27,330.64 which is assigned to Leslie in his column in the marital property balance sheet.

The circuit court did not explain how it had ascertained the cost of Leslie's discovery violations, nor does it appear Jane's attorney submitted any bill or an affidavit to the court regarding the fees incurred.

¶32 A circuit court has the inherent authority to sanction a party or its attorney for litigation misconduct by ordering payment of the opposing party's attorney's fees and costs. *State ex rel. Godfrey & Kahn, S.C. v. Circuit Court for Milwaukee Cty.*, 2012 WI App 120, ¶43, 344 Wis. 2d 610, 823 N.W.2d 816. However, here the circuit court failed to explain how it ascertained the amount of attorney's fees Jane incurred due to Leslie's noncompliance with its orders.

¶33 A circuit court also has discretionary statutory authority to award attorney fees under WIS. STAT. § 767.241(1) (2015-16), which requires the court to make findings regarding the need of the spouse seeking contribution, the ability of the other spouse to pay, and the reasonableness of the total fees. *Kastelic v.*

Kastelic, 119 Wis. 2d 280, 290, 350 N.W.2d 714 (Ct. App. 1984). The circuit court made no such findings here.¹⁰

¶34 A court may also sanction a party who has engaged in overtrial by ordering that party to pay the opposing party’s attorney fees. *Zhang v. Yu*, 2001 WI App 267, ¶13, 248 Wis. 2d 913, 637 N.W.2d 754. However, there was no overtrial finding here, either.

¶35 We reverse the circuit court’s decision requiring Leslie to contribute to Jane’s attorney’s fees because the court failed to substantiate the contribution. On remand, if the court wishes to impose attorney’s fees (either by factoring such an award into the property division or otherwise), it must properly exercise its discretion to do so on the record, explaining both the reason for the award and the necessity of the amount in question, as well as making any other necessary findings.

¶36 No WIS. STAT. RULE 809.25 (2015-16) costs awarded to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

¹⁰ “Absent these findings, an appellate court may independently review the record.” *Kastelic v. Kastelic*, 119 Wis. 2d 280, 290, 350 N.W.2d 714 (Ct. App. 1984). However, our independent review of the record has not yielded any information that would conclusively support the circuit court’s fee determination here.

